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No. 06-1048

Supreme Court, U.S.
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In The
Supreme Court of the United States

KEITH MCFARLAND,

Petitioner,

versus

BRYAN CAVE LLP, PAUL WEIL, MARSHALL & STEVENS, INC., CARL G. HOGAN, JR., BRIAN J. HOGAN, and DAVID HOGAN,

Respondents (all).

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT MARSHALL & STEVENS, INC. IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the Petition where (1) the Seventh Circuit's order affirming the District Court's dismissal of Petitioner's second amended complaint is consistent with this Court's ruling in *Beck v. Prupis*, 529 U.S. 494 (2000); (2) the Seventh Circuit's order affirming the District Court's dismissal of Petitioner's second amended complaint does not conflict with a decision of this Court or a Court of Appeals; and (3) Petitioner does not claim that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

M & S Acquisitions Corp. is the parent corporation of Respondent, Marshall & Stevens, Inc. No publicly held company owns 10% of Respondent, Marshall & Stevens, Inc.

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INTRODUCTION

Petitioner has presented no compelling reason for his Petition for a Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Petitioner fails to demonstrate that the Seventh Circuit's July 21, 2006 Order ("Order") is in conflict with a decision of this Court or another Court of Appeals or that the Seventh Circuit decided an important federal question that has not already been settled by this Court. *See id.* at 10(a)-(c). Indeed, this Court previously refused to recognize the identical claim asserted by Petitioner. *See Beck v. Prupis*, 529 U.S. 494, 507 (2000). The Petition should therefore be denied.

COUNTERSTATEMENT OF THE CASE

Petitioner relies on the combined effect of two provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") that, read in conjunction, provide a civil cause of action for conspiracy. In addition, Petitioner raises various Illinois common law claims over which he asserts supplemental jurisdiction. Petitioner's purported RICO claim is his sole basis for federal jurisdiction. However, Petitioner lacks standing to bring suit under 18 U.S.C. § 1964(c) predicated on a violation of 18 U.S.C. § 1962(d) for injuries caused by overt acts that are not acts of racketeering or otherwise unlawful under RICO.

At the time of the events alleged in the second amended complaint ("complaint"), Petitioner was an employee of Respondent, Marshall & Stevens, Inc. ("M&S"), an appraisal firm incorporated in Delaware. (*See* Pet. App. at 26a-27a). The law firm of Bryan Cave, LLP

("Bryan Cave"), through its agent, Paul Weil, engaged M&S to assist in the preparation of a federal estate tax return for the Estate of Carl G. Hogan, Sr. (the "Hogan Estate"). (Pet. App. at 31a-32a). M&S in turn assigned Petitioner to provide assistance by preparing appraisals for the Hogan Estate. (Pet. App. at 33a-34a).

According to the complaint, Petitioner submitted a draft appraisal concerning one of the assets included in the Hogan Estate. (Pet. App. at 34a-35a). Petitioner alleges that the parties disagreed regarding the values he submitted. (Pet. App. at 35a-36a). He claims that he was asked to assert false values and thereby participate in a tax fraud scheme. (*Id.*). As a result of his refusal to participate, Petitioner alleges that he was "removed from working on the Hogan File and later terminated after sufficient time had passed." (Pet. App. at 36a).

Petitioner claims injuries to his "business and property." (Pet. App. at 43a.) He seeks injunctive relief, lost income and pre-judgment interest, "compensation for past and future pecuniary losses," and "compensation for past and future non-pecuniary losses." (Pet. App. at 44a). In addition, he seeks the benefit of RICO's treble damages provision (*see* 18 U.S.C. § 1964(c)), as well as punitive damages for "malicious and/or reckless conduct." (*Id.*).

The complaint makes clear that Petitioner's refusal to participate in the alleged tax fraud scheme led to the termination of his employment with M&S: "[Petitioner] refused to participate in deriving false value conclusions and refused to sign or affix his signature to said appraisal which effectuated him being removed from working on the Hogan File by the enterprise and then later being terminated from employment with [M&S]." (Pet. App. at 39a).

Moreover, the complaint establishes that the economic injuries claimed necessarily derive from Petitioner's termination. Without Petitioner's claim that he was terminated from his employment with M&S, the complaint provides no basis upon which to infer economic injury. (Pet. App. at 37a-43a).

M&S moved for dismissal based in part on Petitioner's lack of standing to assert his RICO claim. The District Court dismissed Petitioner's RICO claim with prejudice because "[Petitioner] cannot plead he was injured by an act of racketeering," and it declined to exercise supplemental jurisdiction over Petitioner's remaining state law claims. (Pet. App. at 16a). The Seventh Circuit affirmed the District Court's dismissal, holding that the District Court "correctly concluded that [Petitioner's] RICO claim is foreclosed by *Beck*." (Pet. App. at 6a).

REASONS FOR DENYING THE PETITION

Petitioner has presented no compelling reason for this Court to review the Seventh Circuit's finding that the dismissal of Petitioner's RICO claim was appropriate under *Beck v. Prupis*, 529 U.S. 494 (2000). As *Beck* makes clear, Petitioner lacks standing to bring suit under 18 U.S.C. § 1964(c) predicated on a violation of 18 U.S.C. § 1962(d) for injuries caused by overt acts that are not acts of racketeering or otherwise unlawful under RICO. Petitioner is asking this Court to disregard its precedent, without offering any valid reasons for distinguishing his claim.

Moreover, apart from *Beck*, Petitioner does not meet the basic requirements for standing under RICO. Even if

Petitioner could demonstrate the requisite standing to bring suit under 18 U.S.C. § 1964(c), the complaint fails to adequately plead the essential elements of a RICO conspiracy claim. For the reasons set forth herein, this Court should deny the Petition.

I. THE SEVENTH CIRCUIT CORRECTLY CONCLUDED THAT *BECK* MANDATES DISMISSAL OF PETITIONER'S RICO CLAIM.

In *Beck v. Prupis*, 529 U.S. 494, 495-96 (2000), this Court considered whether a person injured by an overt act done in furtherance of a RICO conspiracy has a cause of action under 18 U.S.C. § 1964(c), even if the overt act is not an act of racketeering. The facts in *Beck* are strikingly analogous to the allegations in the present case. The plaintiff Beck was a former employee and shareholder of Southeastern Insurance Group ("SIG"), and the defendants were former senior officers and directors of SIG who engaged in acts of racketeering. *Id.* at 497-98. During much of the time he was employed at SIG, Beck was unaware of the racketeering activities. Once he discovered the defendants' unlawful activity, however, he notified regulators. *Id.* at 498. The defendants then orchestrated a scheme to remove Beck from the company by creating a false report that he had failed to perform his material duties. *Id.* Beck sued the defendants asserting, *inter alia*, a civil cause of action under 18 U.S.C. § 1964(c). Beck claimed that his injuries were proximately caused by an overt act – namely, the termination of his employment – done in furtherance of the defendants' conspiracy. *Id.* at 499.

This Court found that although Beck's termination helped the defendants maintain their RICO conspiracy, it did not confer standing under 18 U.S.C. § 1964(c):

> [W]e conclude that injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO . . . is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d). As at common law, a civil conspiracy plaintiff cannot bring suit under RICO based on injury caused by *any* act in furtherance of a conspiracy that might have caused the plaintiff injury. Rather, consistency with the common law requires that a RICO conspiracy plaintiff allege injury from an act that is . . . independently wrongful under RICO. . . . [Defendants'] alleged overt act in furtherance of their conspiracy is not independently wrongful under any substantive provision of the statute. Injury caused by such an act is not, therefore, sufficient to give rise to a cause of action under § 1964(c).

Id. at 505-06. Because Beck's alleged injuries arose from the termination of his employment, not from any actionable racketeering activity, this Court affirmed the dismissal of his RICO conspiracy claim. *Id.* at 507.

Similarly, in the case at hand, Petitioner cannot claim that the Respondents' allegedly injurious act was an essential part of a RICO conspiracy. Like Beck, Petitioner alleges that his injuries were proximately caused by an overt act – namely, the termination of his employment – done in furtherance of Respondents' purported conspiracy to commit federal tax fraud. Like Beck, Petitioner alleges nearly identical facts:

> [M&S] opined with the other members of the conspiracy that [Petitioner] had become a problem in that he would not participate in the fraud. It was believed that he might even alert government officials regarding the scheme. It was therefore agreed that [Petitioner] would be removed from working on the Hogan File and later terminated after sufficient time had passed.

(Pet. App. at 36a). The Seventh Circuit correctly analyzed these facts, facts it described as "indistinguishable in all material respects" from those in *Beck*, and concluded unequivocally that

> [t]here is no doubt that the injuries about which [Petitioner] complains and the corresponding relief that he seeks (namely, payment for loss of income and past and future pecuniary losses), were proximately caused by his termination, which, wrongful or otherwise, is not an act of racketeering for purposes of RICO.

(Pet. App. at 7a).

Petitioner suggests that the Seventh Circuit reached the wrong conclusion because it "has readily deprived [Petitioner] from having his day in court. . . ." (Pet. at 18). To the contrary, the Seventh Circuit made clear that Petitioner is free to seek various available contract and tort remedies under state law:

> Although [Petitioner] is unable to take advantage of the treble damages provisions for federal claims brought under RICO, we note in closing that his state law claims for tortuous interference of contract and slander were dismissed without prejudice. He is of course at liberty to refile these claims in state court and see how they fare in that tribunal.

(Pet. App. at 8a). Petitioner is therefore incorrect in his blanket and unsubstantiated assertion that "[m]any others finding themselves in similar situations to the [Petitioner] will also be barred unless certiorari is granted." (Pet. at 18).

II. THE SEVENTH CIRCUIT CORRECTLY REJECTED PETITIONER'S RELATED CLAIM UNDER THE HOBBS ACT.

Petitioner's reliance on the Hobbs Act, 18 U.S.C. § 1951, is a red herring. Petitioner attempts to distinguish *Beck* by arguing that, unlike Beck, he was the actual target of racketeering activity because the Respondents needed his work product, namely the appraisal report, to carry out their scheme. (Pet. at 12-13). As the Seventh Circuit noted, this argument "is irrelevant to the RICO standing analysis." (Pet. App. at 6a). Nonetheless, Petitioner continues to argue that Respondent Paul Weil's purported threats to ruin his career constituted predicate acts in furtherance of the alleged conspiracy to commit federal tax fraud. (Pet. at 3 ("Weil told [Petitioner] that he would 'ruin' [Petitioner's] career and lively hood [sic]."); Pet. at 13 ("[Petitioner] was threatened by the attorney to give up a false report and the labor it took to produce the same, in return for the attorney not destroying his career.")). Petitioner contends that "[c]ontrary to the Seventh Circuit's conclusions, the sought after appraisal had considerable value to the extortionists in ripping off the government in taxes." (Pet. at 13).

Petitioner does not allege any Hobbs Act violations by M&S. (*See* Pet. at 4 ("At this point in time neither [M&S] nor any of its employees or agents were in any way involved in the illegality of the scheme. . . . They were in no

way involved in threatening [Petitioner] or trying to influence his appraisal."); Pet. at 11 n.1 ("[M&S] was not a member of the conspiracy when that attorney made the threats. . . ."); Pet. at 12 ("The extortion attempts at first consisted of threats made by the attorney before [M&S] had joined the scheme.")). Regardless, Petitioner's argument fails against all Respondents because it again points to the fatal defect in his claim: he fails to allege any cognizable damages that were proximately caused by the purported illegal threats. Because Petitioner's alleged termination of employment is the *only basis* upon which to conclude that he was injured, his claim fits squarely within the analysis in *Beck*.

The Seventh Circuit emphasized this point as follows:

> In fact, Beck itself provides a stronger example of a plaintiff who was "specifically targeted" for unlawful activity, given that Beck alleged that the defendants in his case created an independent scheme for the sole purpose of firing him, which included hiring an independent insurance company to falsify reports against him and provide cause for his termination. The Supreme Court has made it clear that a RICO plaintiff has standing to recover only "to the extent that, he has been injured in his business or property by conduct constituting the violation," which in this case would be the [Respondents'] alleged efforts to defraud the government by filing false tax documents.

(Pet. App. at 6a-7a) (citation omitted). As such, the Seventh Circuit correctly reiterated its conclusion that

> [t]here is no doubt that the injuries about which [Petitioner] complains and the corresponding relief that he seeks (namely, payment for loss of income and past and future pecuniary losses), were

> proximately caused by his termination, which, wrongful or otherwise, is not an act of racketeering for purposes of RICO.

(Pet. App. at 7a).

Furthermore, the Seventh Circuit correctly concluded that the complaint "alleges no set of facts that constitute extortion under the Hobbs Act." *Id.* (citing *Scheidler v. Nat'l Org. of Women*, 537 U.S. 393, 404 (2003)). Petitioner's complaint concedes that he created the appraisal report in his capacity as an employee of M&S under the direction of Bryan Cave and for use by the Hogans. (Pet. App. at 31a, 33a). As such, as stated by the Seventh Circuit, Petitioner "has no right to pursue a claim that the [Respondents] wrongfully acquired *their own* appraisal reports." (Pet. App. at 8a) (emphasis in original).

III. EVEN APART FROM *BECK*, PETITIONER DOES NOT MEET THE REQUIREMENTS FOR STANDING UNDER RICO.

A plaintiff must meet two basic requirements in order to bring a civil suit under RICO. First, the alleged injury must be to the plaintiff's *business or property*, and not personal in nature. Second, the defendant's alleged acts in violation of RICO must have *proximately caused* the plaintiff's injury. Petitioner's alleged injuries fail on both counts: (1) they are personal in nature; and (2) they are not fairly traceable to the purported unlawful conduct.

A. The Injuries Alleged Are Insufficient to Give Rise to a Cause of Action Under RICO.

Only injuries to "business or property" are compensable under RICO. *See* 18 U.S.C. § 1964(c). Injuries to

"business or property" do not include personal injuries such as embarrassment, humiliation, and emotional distress, even if those personal injuries result in pecuniary loss. *Schiffels v. Kemper Finan. Servs., Inc.*, 978 F.2d 344, 353 (7th Cir. 1992), abrogated by *Beck*, 529 U.S. at 500 (narrowing the scope a civil cause of action under RICO but leaving intact *Schiffels'* determination regarding compensable injuries under RICO). Moreover, a plaintiff cannot recover under RICO for injuries resulting from extortion or intimidation, including the economic aspects of such personal injuries. *Rylewicz v. Beaton Servs., Ltd.*, 888 F.2d 1175, 1179 (7th Cir. 1989). In the present case, Petitioner's claims regarding "past and future nonpecuniary losses" do not involve injuries to Petitioner's business or property and are personal in nature. As such, Petitioner may not rely on these alleged injuries to establish standing under 18 U.S.C. § 1964(c).

B. There is No Causal Connection Between Petitioner's Alleged Injuries and Respondent's Purported RICO Violations.

A RICO plaintiff can only recover for those damages *directly caused* by a defendant's RICO violations. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 259 (1992). There must be "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 266-68; *see also Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 (1985) ("If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, *and the racketeering activities injure the plaintiff in his business or property*, the plaintiff has a claim under § 1964(c).") (emphasis added).

To the extent Petitioner's alleged injuries can be classified as injuries to "business or property," his losses are nonetheless unrecoverable because Petitioner cannot demonstrate that these injuries were proximately caused by the Respondents' purported unlawful conduct. If Petitioner's allegations regarding the Respondents' unlawful conduct were true, such conduct could only have injured parties *other than* Petitioner, namely the federal government. There is *no nexus* between the Respondents' alleged federal tax fraud scheme and Petitioner's demand for injunctive relief, lost income and pre-judgment interest, compensation for past and future pecuniary losses, compensation for past and future non-pecuniary losses, treble damages, and punitive damages for "malicious and/or reckless conduct." These alleged injuries are too remote to confer standing upon Petitioner.

IV. PETITIONER FAILS TO PLEAD THE ESSENTIAL ELEMENTS OF HIS CLAIM.

Even if Petitioner could demonstrate the requisite standing to bring suit under 18 U.S.C. § 1964(c), the complaint fails to adequately plead the essential elements of a RICO conspiracy claim as required under Federal Rule of Civil Procedure 9(b). *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 725-26 (7th Cir. 1998) (stating that a civil RICO complaint is subject to the heightened pleading standard of Federal Rule of Civil Procedure 9(b) which requires a plaintiff to plead all averments of fraud with particularity); *R.E. Davis Chem. Corp. v. Nalco Chem. Co.*, 757 F. Supp. 1499, 1516 (N.D. Ill. 1990) ("Courts have been particularly scrupulous in adhering to the dictate of Rule 9(b) in the RICO context."). RICO claims are to be pled with particularity in part because of the seriousness of a

fraud allegation and in order to prevent the *in terrorem* settlement effect of RICO's treble damages provision. *R.E. Davis*, 757 F. Supp. at 1516.

Moreover, the RICO conspiracy provision "should not be used by the courts to criminalize mere association with an enterprise." *Goren*, 156 F.3d at 731-32 (citing *United States v. Neapolitan*, 791 F.2d 489, 498 (7th Cir. 1986)). Rather, "the touchstone of liability under § 1962(d) is an agreement to participate in an endeavor which, if completed, would constitute a violation of the substantive statute." *Id.* (citing *Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 960 (7th Cir. 1996)). In *United States v. Neapolitan*, the Seventh Circuit analyzed the nature of such an agreement:

> [A] conspiracy to violate RICO can be analyzed as composed of two agreements: an agreement to conduct or participate in the affairs of an enterprise and an agreement to the commission of at least two predicate acts. Thus, a defendant who did not agree to the commission of crimes constituting a pattern of racketeering activity is not in violation of section 1962(d), even though he is somehow affiliated with a RICO enterprise, and neither is the defendant who agrees to the commission of two criminal acts but does not consent to the involvement of an enterprise. *If either aspect of the agreement is lacking then there is insufficient evidence that the defendant embraced the objective of the alleged conspiracy*. Thus, mere association with the enterprise would not constitute an actionable 1962(d) violation.

791 F.2d 489, 499 (citations omitted) (emphasis added).

Accordingly, in order to state a claim for conspiracy under 18 U.S.C. § 1962(d), a plaintiff must allege with particularity that (1) each defendant agreed to maintain an interest in or control of an enterprise or to participate in the affairs of an enterprise through a pattern of racketeering; and (2) each defendant further agreed that, in furtherance of this goal, someone would commit at least two predicate acts. *Slaney v. Int'l Amateur Ath. Fed'n*, 244 F.3d 580, 600 (7th Cir. 2001); *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 965 (7th Cir. 2000). Petitioner's complaint fails in both respects: (1) it does not allege with particularity that M&S agreed to participate in an enterprise; and (2) it does not allege with particularity that M&S agreed to the commission of two predicate acts in furtherance of the purported enterprise.[1]

A. Petitioner Does Not Allege that M&S Agreed to Participate in an Enterprise.

"It is well established that a complaint may be dismissed if it contains only conclusory, vague and general allegations of a conspiracy." *Goren*, 156 F.3d at 733. In

[1] Although the complaint attempts to allege a cause of action for conspiracy, it is worth noting that Petitioner fails to allege a viable cause of action under 18 U.S.C. § 1962(c) as well. In order to state a viable cause of action under 18 U.S.C. § 1962(c), Petitioner must allege: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Goren*, 156 F.3d at 727. In cases involving substantive claims under *both* 18 U.S.C. § 1962(c) and § 1962(d), this Court has held that the failure to establish a violation of § 1962(c) is conclusive regarding a § 1962(d) claim based upon the same facts. *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 677 (7th Cir. 2000) ("Since [plaintiffs] fail to establish a violation of section 1962(c), their section 1962(d) claim based on the same facts must fail as well.") (citing *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1026 (7th Cir. 1992)).

order to state a claim under 18 U.S.C. § 1962(d), a plaintiff "must allege facts from which one can infer *each defendant's* agreement to violate § 1962(c)." *Schiffels*, 978 F.2d at 352 (emphasis added). More specifically, each defendant "must knowingly agree to perform services of a kind which facilitate the activities of those who are operating the enterprise in an illegal manner." *Brouwer*, 199 F.3d at 967. Although each defendant need not agree to operate or manage the enterprise, each defendant must agree to "facilitate the activities of those who do." *Id.*

18 U.S.C. § 1961(4) defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Thus, the definition of "enterprise" encompasses two types of associations: (1) recognized legal entities and (2) extra-legal associations in fact. *United States v. Turkette*, 452 U.S. 576, 581 (1988). Either type must have "an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making." *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995) (internal quotation marks omitted). Further, an enterprise must be more than a group of people who get together to commit a pattern of racketeering activity, and there must be structure and goals separate from the predicate acts themselves. *Id.* at 645.

Petitioner does not allege, nor can it be reasonably inferred from the complaint, that M&S agreed to participate in an enterprise to violate RICO. To the contrary, the complaint generally states that M&S "agreed for a certain fee to prepare appraisals" for the Hogan Estate and that M&S "thereafter renegotiated its fee with the Enterprise."

(Pet. App. at 33a, 36a). Petitioner then asserts the unsubstantiated conclusion that M&S "agreed to participate in the Enterprise and conspiracy by providing false appraisal values for the purpose of federal and state estate tax returns," describing M&S as "a new member of the Enterprise." (Pet. App. at 36a). Beyond these blanket assertions, the complaint provides no details as to the roles played by the individual Respondents, nor does it allege any facts indicating an agreement by the individual Respondents as to which roles they would play in the alleged enterprise. *See R.E. Davis*, at 1526 (concluding that "[e]ven the most generous interpretation of this boilerplate allegation would not enable it to survive the motion to dismiss, for the complaint is bare of factual allegations from which one might infer that defendants agreed among themselves to conduct [their] affairs through a pattern of racketeering activity.").

B. Petitioner Does Not Allege that M&S Agreed to the Commission of at Least Two Predicate Acts.

In order to state a claim under 18 U.S.C. § 1962(d), Petitioner need not allege an agreement by each of the Respondents to individually commit two predicate acts of racketeering activity. He must, however, allege an agreement by *each Respondent* to the commission (by someone) of two specific predicate acts *on behalf of the alleged enterprise*. *Goren*, 156 F.3d at 732. It is insufficient for Petitioner to allege an agreement by the Respondents "to a single transaction with the alleged enterprise." *Id.* In addition, with respect to 18 U.S.C. § 1962(c) which forbids "conduct of [an] enterprise's affairs through a pattern of racketeering activity," the term "through" has been

interpreted by this Court to mean "by means of, in consequence of, by reason of." *United States v. Kovic*, 684 F.2d 512, 517 (7th Cir. 1982) (citing *United States v. Nerone*, 563 F.2d 836, 851 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978)).

18 U.S.C. § 1961 sets forth an exhaustive list of acts of "racketeering" commonly referred to as "predicate acts." *See* 18 U.S.C. §§ 1961(1)(A), (B). In an effort to substantiate his claim that Respondents agreed to the commission of at least two specific predicate acts, Petitioner cites various activities prohibited under 18 U.S.C. § 1961. He asserts conclusory, vague and general allegations regarding the Respondents collectively and their purported activities in contravention of 18 U.S.C. § 1957 (prohibiting the engagement in monetary transactions using property derived from specified unlawful activity), 1951 (prohibiting interference with commerce by threats or violence), and 1510 (prohibiting obstruction of criminal investigations). (*See* Pet. App. at 39a-40a). In addition, Petitioner alleges in boilerplate terms that "[c]ontemplated in the conspiracy to violate 18 U.S.C. § 1962(c) was that the participants of the enterprise would necessarily violate the 18 U.S.C. § 1341 mail fraud and 18 U.S.C. § 1343 wire fraud provisions of law by utilization of the United States Postal Service and telephone/email communications to facilitate the scheme." (Pet. App. at 40a). Petitioner then describes ten "transmittals" between the Respondents, all of which related to the parties' *lawful* duties as described by Petitioner (Pet. App. at 31a-33a), and none of which are alleged to have been communicated for the purpose of injuring Petitioner. (Pet. App. at 41a-43a).

A plaintiff alleging the predicate act of mail fraud must do so with particularity pursuant to Federal Rule of

Civil Procedure 9(b). *Slaney v. Int'l Amateur Ath. Fed'n*, 244 F.3d 580, 599 (7th Cir. 2001). In order to satisfy Rule 9(b) in this regard, a plaintiff must "allege the identity of the person who made the representation, the time, place and content of the misrepresentation, *and the method by which the misrepresentation was communicated to the plaintiff.*" *Id.* (citing *Vicom, Inc. v. Harbridge Merchant Serv., Inc.*, 20 F.3d 771, 777 (7th Cir. 1994)). Again, Petitioner's lack of standing to raise his RICO conspiracy claim is evident. Taking Petitioner's allegations as true, it cannot be reasonably inferred from the complaint that Petitioner was the intended target of any of these alleged misrepresentations.

More importantly, however, the complaint is utterly devoid of allegations concerning *each Respondent's* agreement to the commission of these activities. There is no basis upon which to infer that these alleged activities were *on behalf of* the purported enterprise. Petitioner cannot escape the fact that throughout his complaint, he continuously refers to an alleged agreement by the Respondents "to a single transaction with the alleged enterprise," namely to falsify estate tax returns relating to the Hogan File. *See Goren*, 156 F.3d at 732. Given its lack of particularity concerning the nature and scope of the enterprise, the complaint "*cannot be saved by its many conclusory and vague allegations concerning the collective conduct of the defendants.*" *Goren*, 156 F.3d at 733 (quotations omitted) (emphasis added).

CONCLUSION

Because Petitioner has not established any compelling reasons for this Court to grant the Petition, Respondent, Marshall & Stevens, Inc., respectfully requests that the Petition be denied.

Respectfully submitted,

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